

No. 78-589

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEWIS W. POE, PETITIONER

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT***

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner commenced this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States for injuries allegedly incurred when he was detained and subjected to a psychiatric examination by military personnel. Because petitioner was a member of the Air Force at the time of the events in question, the district court dismissed the suit, and the court of appeals affirmed. Both courts relied on *Feres v. United States*, 340 U.S. 135 (1950), which held that servicemen cannot recover against the United States, under the Federal Tort Claims Act, for injuries incident to their service.

Petitioner argues that *Feres* should no longer be followed because, in 1974, Congress amended the Tort Claims Act to remove the former limitation against recovery for injuries arising from assault, battery, and

false imprisonment. See 88 Stat. 50, amending 28 U.S.C. 2680(h). But the rationale of *Feres*—that suits calling into question the decisions of military officers would have a debilitating effect on discipline and military readiness—is as applicable to claims such as petitioner's as it is to medical malpractice and other torts of the sort involved in *Feres* and its companion cases. One of the cases involved a fire negligently destroying a barracks; the second case involved a towel left in a patient after an operation; the third involved another form of medical malpractice (340 U.S. at 136-137). If servicemen cannot recover from the United States for torts of those sorts, they also cannot recover on claims of the sort petitioner presents.*

Petitioner's argument that civilians can recover for assault and false imprisonment is beside the point, for the very holding of *Feres* is that suits by military personnel will be assessed under different standards. Nothing in the recent amendments to the Tort Claims Act indicates that Congress is dissatisfied with that approach, which this Court has recently reaffirmed. See *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).

*Petitioner filed suit against the military personnel as well as against the United States. The lower courts dismissed his suit against the individual defendants, and he has sought review in this Court. *Poe v. Mitchell*, petition for cert. pending, No. 78-733. We will reply to No. 78-733 in a separate memorandum.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978